United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1132

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-1132

UNITED STATES OF AMERICA,

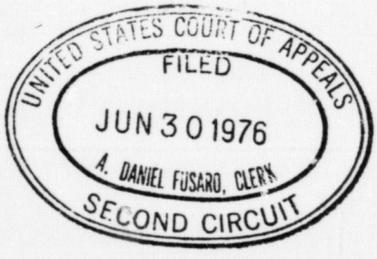
Appellee,

v.

SNIDER BLANCHARD,

Appellant.

Appeal From The United States District Court For The Southern District Of New York (Dubley B. Bonsal, Judge)



APPELLANT'S BRIEF

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Appeal From The United States District Court For The Southern District Of New York (Dubley B. Bonsal, Judge)

APPELLANT'S BRIEF

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I) Did the court err in admitting into evidence the government's exhibit No. 16a because of its prejudicial effect?

II) Did the court err in refusing to examine jurors for possible bias during trial, when at least two jurors

had demonstrated bias against defense attorneys in open court?

STATEMENT OF THE CASE

On January 21, 1976, trial on indictment No. 75-CR772 commenced in the United States District Court for the Southern District of New York against Snider Blanchard, Appellant, and Others. The jury returned a guilty verdict on February 6, 1976 as to Blanchard on counts 1, 8, 9 and 20. Sentencing was deferred pending receipt of pre-sentence investigation. On March 24, 1976, Blanchard was sentenced to a term of imprisonment of ten years as to each Count of the indictment, said terms to run concurrently. An appeal to the United States Court of Appeals for the Second Circuit was noted on March 24, 1976, the same day as the sentencing.

The primary witness against Blanchard was Anthony Manfredonio, who testified in substance that, beginning in 1966, he and Blanchard entered into illegal narcotics transactions which occurred periodically and lasted through the summer of 1973. Said transactions took place in Baltimore, Maryland and within the Southern District of New York. Manfredonio testified that in most instances he personally delivered quantities of from one-quarter to one-half kilogram of heroin to Blanchard; in the other transactions, an associate of Manfredonio would make the actual delivery.

The other evidence introduced against Blanchard consisted of government exhibits Nos. 8, 19 and 16a. Exhibit No. 8 was the personal telephone book of Anthony Manfredonio, which contained various telephone numbers of Blanchard. Introduced into evidence as government exhibit No. 19 were the telephone toll records indicating long distance calls being made from telephone number 632-2764, a telephone to which Manfredonio and one of the co-conspirators had access, to a telephone number in Baltimore, Maryland, that Blanchard used. Lastly, government exhibit No. 16(a) was a xerox copy of a page in a personal address book which had been seized on February 6, 1973 by the New York City police from an individual referred to as "Nevado", an alleged heroin dealer. The relevant portion of that page was a notation reading: "Jim Blanchard, The Jap, somewhere on Green Street."

ARGUMENT

I. THE COURT ERRED IN ADMITTING INTO EVIDENCE THE GOVERNMENT'S EXHIBIT NO. 16a BECAUSE ITS PROBATIVE VALUE WAS GREATLY OUTWEIGHED BY CONSIDERATIONS OF PREJUDICE TO THE DEFENDANT

Over objection by defense counsel, the court allowed entry of exhibit No. 16(a), the page from Nevado's address book, subject to connection. A connection was never subsequently established between Blanchard and Nevado; more fundamentally, no connection was ever established to identify the "Jim" Blanchard referred to in Nevado's address book as the "Snyder" Blanchard on trial. At no point during the course of the trial was Appellant Snyder Blanchard ever re-

ferred to as "Jim". Assuming arguendo that the individual named in Nevado's address book was indeed the same Blanchard who was standing trial, no evidence was ever presented to prove that the notation was prepared in furtherance of the conspiracy. The government did not produce evidence as to when the notation was made; it could have been made before or after the duration of the conspiracy. Nevertheless, the notation was introduced at trial as evidence of Blanchard's participation in the conspiracy, and the jury was never warned by the judge of the problems involved.

In this light, it is evident that the entry of the notation was highly prejudicial, and that Blanchard was unjustly damaged in his defense. The prejudice suffered is also demonstrated when the notation is compared with the rest of the evidence put forth against Blanchard. This consisted of Manfredonio's address book, containing Blanchard's telephone number, with the record of telephone calls made thereto by Manfredonio, and Manfredonio's testimony, implicating Blanchard as a buyer in the narcotics conspiracy. The first has little probative force: the mere making of telephone calls does not prove involvement in the caller's unlawful activities. As for the latter evidence, although it would be extremely damaging if believed, the testimony was severely hampered by Manfredonio's lack of credibility. Thus, the notation, seemingly cataloging a concrete event, an overt act, done in furtherance of the conspiracy, was the only really tangible evidence presented against Blanchard. It is quite possible that it formed the real

basis behind the finding by the jury that Blanchard was guilty. The possibility of improper use of the evidence by the jury, when its relevance had not been sufficiently established, should have kept the evidence out. See Fed. R. Ev. 403, which states that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice".

The trial judge has wide discretion in deciding whether to admit evidence, U.S. v. Ravich, 421 F.2d 1196, 1205 (2d.Cir. 1970), cert. den., 400 U.S. 834; Kilargian v. Horvath, 379 F.2d 547, 548 (2d.Cir. 1967); U.S. v. Costello, 221 F.2d 668 (2d.Cir. 1955), affirmed, 350 U.S. 359, reh. den. 351 U.S. 904. An appellate court will reverse for an abuse of discretion, Kilargian, supra, 379 F.2d at 548; see also, Ravich, supra, 421 F.2d at 1204-05. In this case the judge clearly abused his discretion by admitting the notation, in light of the shortcomings discussed above, which abuse resulted in unfair prejudice to Blanchard and for which Blanchard respectfully requests a new trial.

II. THE COURT ERRED IN REFUSING TO EXAMINE JURORS FOR BIAS DURING TRIAL, TO DETERMINE WHETHER AN ALTERNATE JUROR SHOULD HAVE BEEN SUBSTITUTED, WHEN AT LEAST TWO JURORS HAD DEMONSTRATED BIAS AGAINST DEFENSE ATTORNEYS IN OPEN COURT

During the course of the trial, and in open court, two jurors blurted out statements that clearly evidenced a bias against certain defense attorneys on cross-examination. During cross-examination of the witness Carter by Mr. Edward

Panzer, Esq.,defense counsel for James Panebianco, juror No. 10 commented: "Why is he asking that question again?" When Mr. Abe Solomon,defense counsel for Anatala,was cross-examining the same witness, the same juror stated to juror No. 9: "Why doesn't he stop wasting our time?" At another point during the trial, Mr. Solomon heard juror No. 3 state during cross-examination: "He has some nerve asking those questions." These statements were repeated by Mr. Panzer in a bench conference, and made a part of the record.

The Sixth Amendment of the Constitution guarantees that every defendant in a jury trial has the right to an impartial jury. Thiel v. Southern Pacific Company, 328 U.S. 217, 220 (1946). To secure this right, Rule 24 of the Federal Rules of Criminal Procedure allows both parties to examine prospective jurors for bias or prejudice. To secure the right throughout the course of the trial, Rule 24(c) permits the court to impanel alternate jurors, to serve in place of original jurors, "who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties" (emphasis added).

As explained in the Committee Notes to Rule 24(c), the words "or are found to be" were added to make clear that alternate jurors may be called when the basis for disability either develops or surfaces during trial. During voir dire, if it is discovered that a prospective juror is biased or prejudiced in such a way that defendant's right to a fair trial may be jeopardized, then he is excused for cause. In like

manner, if facts surface during trial which suggest that the juror's ability to perform his duties have become impaired, then the judge should examine said juror, and, if in fact the juror cannot function properly, he should be replaced with an alternate juror, U.S. v. Floyd, 496 F.2d 982, 990, (2d.Cir.1974); Remmer V. United States, 350 U.S. 377 (1956) (The Supreme Court feared attempt to bribe juror may have affected juror's impartially), followed in Gold v. United States, 352 U.S. 985 (1957); Parker v. Gladden, 385 U.S. 363 (1966)(The Supreme Court feared comments by baliff to jury members may have biased jurors against defendant). The burden is upon the judge to guard the defendant's right to an impartial trial, and he has wide discretion as to whether to substitute an alternate juror, Floyd, supra, 496 F.2d at 990; U. S. v. Ellenbogen, supra, 365 F.2d at 985.

In the present case, the judge did not allow inquiry as to whether any of the jurors might have been influenced by the statements of the two jurors who spoke out during trial. In so doing the trial court abused its discretion by closing off the defendant's right to check for prejudice. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial trial," Morford v. U.S., 339 U.S. 258, 259 (1950). The neglect of the trial judge exposed the defendant to at least two biased jurors. It is the responsibility of the appeals court to determine whether this fault resulted in prejudice to the defendant which was harmful to his case, and "if so, to grant a new trial," Remmer, supra, 350 U.S. at 378.

In Parker, supra, the Supreme Court affirmed the trial court's decision that unauthorized communications by the baliff to the jury were prejudicial and materially affected the petitioner's rights. The unauthorized conduct of the baliff involved such a probability of prejudice that it was deemed "inherently lacking in due process," 385 U.S. at 365, quoting Estes v. Texas, 381 U.S. 532, 542-43 (1965). Although ten of the jurors in that case had not heard the baliff's words, and Oregon law permitted a verdict of guilty by ten affirmative votes to be sufficient to convict, the Court asserted that "petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors," 385 U.S. at 366. Appellant Snider Blanchard respectfully asserts that he has been deprived of his right to be tried by 12 impartial and unprejudiced jurors. In this case, the statements made by the two jurors at different points during the trial evidenced bias, and said statements may have had a prejudicial effect on the remaining jurors. This negative influence could have affected their decision with respect to thier verdict against Blanchard. Since jurors cannot, with rare exception, impeach their own verdict, a new trial is the only fair and equitable remedy.

CONCLUSION

Appellant Snider Blanchard requests that, for the above-mentioned arguments, his conviction be reversed, and the

case be remanded for a new trial.

Respectfully submitted,

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IN THE UNITED STATES
COURT OF APPEALS FOR
THE SECOND CIRCUIT

UNITED STATES OF AMERICA *

v. *

VIRGIL ALESSI, et al * Docket No. 76-1132

* * *

APPELLANT BLANCHARD'S
PROOF OF SERVICE
PURSUANT TO RULE 25(d)

I HEREBY CERTIFY that on June 23, 1976 I mailed two (2) copies of Appellant's brief to each of the following individual attorneys of record, by first class mail, postage prepaid.

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